

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JAVON LAMAR TORBERT,
CDCR #P-96193,

Plaintiff,

vs.

COUNTY OF SAN DIEGO; MADSEN;
STORTON; BLACK; MIDECKE;
OGSBERT; JOHN DOES,

Defendants.

Civil No. 11cv2953 DMS (WMc)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO PARTIAL FILING
FEE, GARNISHING \$350 BALANCE
FROM PRISONER'S TRUST
ACCOUNT [ECF No. 2];**

**(2) DENYING MOTION FOR
APPOINTMENT OF COUNSEL
[ECF No. 3]**

AND

**(3) DIRECTING U.S. MARSHAL
TO EFFECT SERVICE OF
COMPLAINT PURSUANT TO
FED.R.CIV.P. 4(c)(3) & 28 U.S.C.
§ 1915(d)**

Javon Lamar Torbert ("Plaintiff"), a state prisoner currently incarcerated at High Desert State Prison, and proceeding pro se, has submitted a civil action pursuant to 42 U.S.C. § 1983. Plaintiff has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [ECF No. 2], along with a Motion for Appointment of Counsel [ECF No. 3].

///

1 **I. MOTION TO PROCEED IFP [ECF No. 2]**

2 All parties instituting any civil action, suit or proceeding in a district court of the United
 3 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
 4 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee
 5 only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*
 6 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to
 7 proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their
 8 action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2).

9 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.
 10 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to
 11 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust account statement shows that
 12 he has no available funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4).
 13 Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed IFP [ECF No. 2] and assesses no
 14 initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the
 15 filing fee mandated shall be collected and forwarded to the Clerk of the Court pursuant to the
 16 installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

17 **II. MOTION FOR APPOINTMENT OF COUNSEL [ECF No. 3]**

18 Plaintiff also requests the appointment of counsel to assist him in prosecuting this civil
 19 action. The Constitution provides no right to appointment of counsel in a civil case, however,
 20 unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v.*
 21 *Dept. of Social Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1),
 22 district courts are granted discretion to appoint counsel for indigent persons. This discretion may
 23 be exercised only under "exceptional circumstances." *Terrell v. Brewer*, 935 F.2d 1015, 1017
 24 (9th Cir. 1991). "A finding of exceptional circumstances requires an evaluation of both the
 25 'likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se
 26 in light of the complexity of the legal issues involved.' Neither of these issues is dispositive and
 27 both must be viewed together before reaching a decision." *Id.* (quoting *Wilborn v. Escalderon*,
 28 789 F.2d 1328, 1331 (9th Cir. 1986)).

1 The Court denies Plaintiff's request without prejudice, as neither the interests of justice
 2 nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*,
 3 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

4 **III. INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(b)(ii) and 1915A(b)(1)**

5 Notwithstanding IFP status or the payment of any partial filing fee, the Court must subject
 6 each civil action commenced pursuant to 28 U.S.C. § 1915(a) to mandatory screening and order
 7 the sua sponte dismissal of any case it finds "frivolous, malicious, failing to state a claim upon
 8 which relief may be granted, or seeking monetary relief from a defendant immune from such
 9 relief." 28 U.S.C. § 1915(e)(2)(B); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en
 10 banc) (noting that 28 U.S.C. § 1915(e) "not only permits but requires" the court to sua sponte
 11 dismiss an *in forma pauperis* complaint that fails to state a claim).

12 "[W]hen determining whether a complaint states a claim, a court must accept as true all
 13 allegations of material fact and must construe those facts in the light most favorable to the
 14 plaintiff." *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). In addition, the Court has a duty
 15 to liberally construe a pro se's pleadings, *see Karim-Panahi v. Los Angeles Police Dep't*, 839
 16 F.2d 621, 623 (9th Cir. 1988), which is "particularly important in civil rights cases." *Ferdik v.*
 17 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

18 The Court finds that Plaintiff's claims are sufficiently pleaded to survive the sua sponte
 19 screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Therefore, Plaintiff is entitled to
 20 U.S. Marshal service on his behalf. *See Lopez*, 203 F.3d at 1126-27; 28 U.S.C. § 1915(d) ("The
 21 officers of the court shall issue and serve all process, and perform all duties in [IFP] cases.");
 22 FED.R.CIV.P. 4(c)(3) ("[T]he court may order that service be made by a United States marshal
 23 or deputy marshal ... if the plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C.
 24 § 1915."). Plaintiff is cautioned, however, that "the sua sponte screening and dismissal
 25 procedure is cumulative of, and not a substitute for, any subsequent Rule 12(b)(6) motion that
 26 [a defendant] may choose to bring." *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal.
 27 2007).

28 ///

1 **IV. CONCLUSION AND ORDER**

2 Good cause appearing, **IT IS HEREBY ORDERED** that:

3 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 2] is
4 **GRANTED.**

5 2. The Secretary of California Department of Corrections and Rehabilitation, or his
6 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee
7 owed in this case by collecting monthly payments from the account in an amount equal to twenty
8 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court
9 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).
10 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**
11 **ASSIGNED TO THIS ACTION.**

12 3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
13 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
14 Sacramento, California 95814.

15 **IT IS FURTHER ORDERED** that:

16 4. Plaintiff's Motion for Appointment of Counsel [ECF No. 3] is **DENIED** without
17 prejudice.

18 5. The Clerk shall issue a summons as to Plaintiff's Complaint [ECF No. 1] upon the
19 Defendants and shall forward it to Plaintiff along with a blank U.S. Marshal Form 285 for
20 each Defendant. In addition, the Clerk shall provide Plaintiff with a certified copy of this Order
21 and a certified copy of his Complaint and the summons for purposes of serving the Defendants.
22 Upon receipt of this "IFP Package," Plaintiff is directed to complete the Form 285 as completely
23 and accurately as possible, and to return it to the United States Marshal according to the
24 instructions provided by the Clerk in the letter accompanying his IFP package. Thereafter, the
25 U.S. Marshal shall serve a copy of the Complaint and summons upon the Defendants as directed
26 by Plaintiff on the USM Form 285. All costs of service shall be advanced by the United States.
27 See 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

28 *///*

1 6. Plaintiff shall serve upon the Defendants or, if appearance has been entered by
2 counsel, upon Defendants' counsel, a copy of every further pleading or other document
3 submitted for consideration of the Court. Plaintiff shall include with the original paper to be
4 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy
5 of any document was served on the Defendants, or counsel for Defendants, and the date of
6 service. Any paper received by the Court which has not been filed with the Clerk or which fails
7 to include a Certificate of Service will be disregarded.

IT IS SO ORDERED.

10 | DATED: December 29, 2011

HON. DANA M. SABRAW
United States District Judge